

**REPORT OF
THE ATTORNEY GENERAL**

RE: CHOICELINX AND RELATED MATTERS

March 4, 2004

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INTRODUCTION

On or about June 25, 2003, the Governor and Council was presented with, and approved, a contract between the State and Choicelinx Corporation in the amount of \$885,000. As stated in the accompanying cover letter signed by Commissioner Don Hill, the contract obligated Choicelinx to “operate, manage, and administer a comprehensive web-based enrollment process and call-center solution which will automate the State’s benefits administrative activities including enrollment, plan selection, benefit configuration, and on-going services.” The letter stated that before selecting Choicelinx as the vendor of these services,

the State requested information from vendors (SHP in KY, Black Mountain Black [sic] in NY, Definity Health in MN, Covantage in TX, Lumenos in VA) with similar capabilities. Choicelinx was the only company to respond that had the hardware, software, personnel and experience to fulfill the State’s requirements of a web-based benefits administration management system accessible by users on or before September 1, 2003.

On November 20, 2003, Josh Rogers of New Hampshire Public Radio reported that he had contacted four of the five companies listed in the above-referenced letter and none could recall having been contacted by the State of New Hampshire. Simultaneously, questions were being raised in the media concerning an individual by the name of Linda Pepin, a volunteer in Governor Benson’s office who was involved in the procurement of the Choicelinx contract. There were allegations that Ms. Pepin had incorrectly identified herself as a state employee in her negotiations, and that she had received commission payments for her role in negotiating the contract for state employees’ health insurance.

As a result of the above circumstances, the Attorney General conducted an investigation of the circumstances surrounding the awarding of the contract to Choicelinx, Ms. Pepin’s role during the contract negotiations, and her receipt of commission fees. Associate Attorney General Ann Rice was assigned to conduct the investigation with the assistance of Investigator Donald Vandal. During the course of the investigation, the investigative team interviewed the following individuals:

- Deputy Attorney General Kelly Ayotte, former legal counsel to Governor Benson
- Governor Craig Benson
- Robert T. Bergan, BenApex Inc.; Orion Benefits Group
- Eileen Bernard, Director of Risk Management, Division of Administrative Services
- Skip Brickley, Emergent Group, LLC
- Michael Brown, Senior Assistant Attorney General
- Dennis Cahill, Director of Sales - NH, Anthem Blue Cross/Blue Shield
- Greta Cocco, First Benefits, Inc. and Orion Benefits Group
- Tom Delacey, Account Executive, CIGNA
- Erika Flewelling, Division Service Manager, Northeast Delta Dental
- Dennis French, NIBRI Benefits and Orion Benefits Group
- Chris Henchey, co-founder and C.O.O., Choicelinx Corporation
- Keith Herman, Policy Advisor to Governor Benson

- Daniel Higgins, Vice-President of National Accounts, CIGNA
- Donald Hill, Commissioner, NH Division of Administrative Services
- Randy Hunneyman, Member of the S.E.A. negotiating team for the collective bargaining agreement
- Ann Larney, Associate Attorney General
- Suzan Lehmann, Assistant Attorney General
- Donna Lencki, co-founder and C.E.O., Choicelinx Corporation
- Attorney Gary Lenehan, counsel for Joseph D'Alessandro
- Peter Lundsford, Kenmore Associates
- Thomas Manning, Former Director of Personnel, State of NH
- Frank Marcellino, former insurance broker for the State of New Hampshire
- Attorney Richard Molan, Member of S.E.A. negotiating team for the collective bargaining agreement;
- John O'Leary, Account Manager, Anthem Blue Cross/Blue Shield
- Wendell Packard, Press Secretary to Governor Benson
- Attorney Donald Pfundstein, counsel for Governor Benson's Transition Team
- Donald Piatt, Kenmore Associates
- Tom Raffio, President and C.E.O., Northeast Delta Dental
- John Ratoff, Commissioner, Department of Employment Security and Chair of the State's negotiating team for the collective bargaining agreement
- Attorney Chris Reid, former legal counsel to Governor Benson
- Former Governor Jeanne Shaheen
- Mary Anne Steele, Executive Secretary to the Personnel Appeals Board
- Attorney Andru Volinsky, counsel for Linda Pepin
- Sara Willingham, Manager of Employee Relations, Division of Personnel
- Peter Yao, Budget Advisor to Governor Benson

Dennis French and Robert Bergan both agreed to speak with investigators after being granted limited immunity from criminal prosecution for the specific information they provided during their respective interviews. Linda Pepin and Joseph D'Alessandro, Director of Personnel, were offered the opportunity to talk with the investigative team, but were not extended an offer of immunity. They declined that opportunity through their respective attorneys. Instead, Attorney Gary Lenehan, counsel for D'Alessandro, and Attorney Andru Volinsky, counsel for Pepin, gave a proffer as to what each believed his client would say if interviewed. Any reference to information provided by D'Alessandro or Pepin in the following narrative reflects a representation made by their respective attorney.

General Background Information

Governor Benson was elected in November 2002. Immediately thereafter, he formed a transition team, a member of which was Joseph D'Alessandro. D'Alessandro had formerly served as the Director of Human Resources at Cabletron, where he was responsible for compensation and benefits. D'Alessandro worked on the transition team from November 2002 through February 2003, after which he was appointed as Director of Personnel. He officially assumed that position on March 7, 2003.

As a member of the transition team, D'Alessandro focused on budget issues and, more specifically, how to reduce the cost of employee benefits. Consideration was given to both redesigning the benefit plans and moving away from a fully funded program to a self-funded insurance program. D'Alessandro worked with Peter Yao to establish costs for employee benefits for the upcoming biennium, for inclusion in the Governor's proposed budget. Later, as the Director of Personnel, it was D'Alessandro's responsibility to bring employee benefit costs into line with those proposed budget figures.

The contract with Anthem Blue Cross/Blue Shield ("Anthem") for state employees' health insurance was slated to expire on June 30, 2003, less than four months after D'Alessandro became Director of Personnel. Any change to the program design or plan administration would have to be finalized and incorporated into the new contract. However, before any alteration in benefits could be built into a contract, it would have to be approved by the State Employees' Union as part of the collective bargaining agreement. The collective bargaining agreement was also slated to expire on June 30, 2003, and negotiations between the State and the union were well underway.

Soon after assuming office, Governor Benson replaced several members of the State's collective bargaining agreement negotiating team with his own appointees, one of whom was Linda Pepin. Pepin was a former employee of Cabletron, where she had been D'Alessandro's immediate supervisor. After leaving Cabletron, Pepin had established her own human resources consulting company, AlphaDirections, Inc. D'Alessandro worked for AlphaDirections, Inc. on an informal basis, assisting Pepin in developing the business, before he was appointed as Director of Personnel.

Although not formally designated as such, Pepin became the leader of the negotiating team with respect to health care issues. Members of both the State's and the SEA's negotiating team report that, in that role, Pepin did a significant amount of research in the area of health care benefits, including performing a comparative study of benefit plans provided by the other 49 states, researching alternative plan designs, and obtaining information from insurance carriers on the cost impact of those alternatives.

In addition to her work as a member of the negotiating team, Pepin worked closely with D'Alessandro on health care issues. She was actively involved in dealing with the health insurance carriers during contract negotiations, both before and after D'Alessandro's appointment as Director of Personnel. That work appears to have been the result of an informal agreement between Pepin and D'Alessandro. According to Governor Benson, with the exception of her formal appointment as a member of the negotiating team, Pepin had no official role in the administration. The Governor stated that, contrary to press reports, Pepin had not been appointed as a health care advisor. He was aware that D'Alessandro was "leveraging Pepin's expertise" in that area to deal with employee benefit issues, but he did not expressly authorize that arrangement. It was his understanding that Pepin was simply working as a volunteer for D'Alessandro.

The Choicelinx Contract

Choicelinx Corporation is a NH-based business that has developed software for an employee benefits management system. Its co-founders are Donna Lencki, president and CEO, and Chris Henchey, COO. Prior to starting Choicelinx, Ms. Lencki worked at Healthsource and as a consultant for the NH Department of Insurance. Mr. Henchey previously had been employed as the COO for HealthSource New Hampshire, the operational lead for the New England Division of CIGNA, chief negotiator for the SEA's collective bargaining agreement negotiating team, and in a variety of other positions for the SEA.

Lencki first made business overtures to the State during the Shaheen administration. Governor Shaheen recalled Lencki contacting her directly to discuss the Choicelinx product. While Governor Shaheen was of the opinion that the product could be of benefit to the State in the future, she was in her final term and was in no position to make recommendations about the product. Instead, she referred Lencki to then-Director of Personnel, Tom Manning. It is unclear whether a meeting followed, but the issue of Choicelinx essentially died.

According to Henchey, he had engaged in several discussions with SEA officials, including Richard Molan, chief negotiator for the SEA, about Choicelinx during the fall of 2002, prior to Governor Benson's election. Molan recalled meeting with Henchey and Lencki as early as 2001. Henchey was left with the impression that the union was receptive to the product, an impression that Molan confirmed.

After D'Alessandro and Pepin became members of the negotiating team, they and a small number of other members formed an ad hoc committee focusing on insurance issues. The committee members included D'Alessandro, Pepin, and Sarah Willingham for the State, and Molan, Randall Hunneyman, and Dennis Kinnen for the SEA. It was decided that vendors would be invited to make presentations to the committee. According to Molan, he suggested that Choicelinx be included as a potential vendor. He recalled Pepin and D'Alessandro indicating at the time that neither of them was familiar with the company. Pepin took responsibility for scheduling the presentations. To that point, she had not had any dealing with Choicelinx.

At Pepin's request, Henchey met with the committee on April 22, 2003, and gave a demonstration of the Choicelinx program. Molan and Hunneyman both report that they were impressed with the product and felt that it could deliver a benefit to the State. Kinnen also saw potential benefits, in that the product would enable the SEA to get accurate, real time, information about insurance usage. After the demonstration, the committee had no further discussion about Choicelinx, nor was there any discussion about other, comparable products. Molan recalls that he next heard Choicelinx mentioned in August, when he learned that the State had contracted with Choicelinx.

In the meantime, the State was engaged in ongoing negotiations with Cigna and Anthem for the state employee health insurance contract that was due for renewal on July 1, 2003. By all accounts, D'Alessandro and Pepin represented the State during those negotiations, with Pepin as the main contact person. In or around May 2003, at Pepin's invitation, Anthem account executives John O'Leary and Dennis Cahill attended a meeting at the Choicelinx headquarters.

Erika Flewelling, account executive for Delta Dental also attended. (Delta Dental was then, and continues to be, the dental insurance provider for the State.). Several of the attendees described the meeting as a “kickoff” for the Choicelinx program. Thereafter, O’Leary and Flewelling attended weekly meetings with representatives from Choicelinx and the State (both Maryann Steele and Pepin were regularly in attendance). The purpose of those meetings was to identify and resolve issues surrounding the integration of the Choicelinx program with the insurance carriers’ systems. Both Flewelling and O’Leary understood that Choicelinx had not yet signed a contract with the State. O’Leary stated that there was a clear, if unspoken, understanding that Anthem would be required, as part of any contract renewal, to reconfigure its software to make it compatible with Choicelinx. The participants were operating under the assumption that the new insurance contract would be awarded to Anthem, although negotiations were still ongoing.

Tom Delacey and Daniel Higgins of Cigna also met with Choicelinx representatives, at Pepin’s request. That meeting was separate from the “kickoff” referenced above, and was followed by a single meeting between Choicelinx representatives and technology personnel from Cigna. Following those two meetings, there was no further interaction between Cigna and Choicelinx until Cigna was ultimately awarded the health insurance contract in September.

At some point, the Choicelinx program was discussed with Commissioner Hill. The date and content of, and participants in, that discussion are somewhat unclear. Henchey and Lencki recall meeting with Hill, D’Alessandro, and Pepin. According to Henchey, that meeting took place on May 5, 2003. He recalls a lengthy discussion about the Choicelinx program, including the fact that use of the benefits configurator component of the program would be contingent upon an anticipated change in the terms of the collective bargaining agreement. Hill specifically asked who were Choicelinx’s competitors and Pepin agreed to check with at least two other companies. (Henchey does not know if that occurred.) At the conclusion of the meeting, it was Lencki’s impression that a contract would be finalized.

Hill recalls having a discussion about Choicelinx with D’Alessandro and Pepin in late May or early June. During that discussion, D’Alessandro conveyed the following information: Choicelinx had developed an innovative tool to manage employee benefits, which would enable employees to enroll on-line and, at some future point, to configure their own benefits using a cafeteria-style enrollment plan. Choicelinx would provide an employee help-line as part of its program. The enrollment program would dramatically cut costs to the State and insurance carriers would give the State a discount for using it. The insurance advisory committee had looked at the product and was recommending that the State use it. D’Alessandro and Pepin had contacted other companies and no one could provide the same services.

Based on that information, Hill felt it was appropriate to pursue a contract with Choicelinx. Typically, when a service contract is being considered, Hill will require the agency to send out a Request for Proposal (“RFP”), even if that process is not required by statute. Although Hill viewed the proposed contract with Choicelinx as a service contract, he did not require that D’Alessandro follow the RFP process, because of D’Alessandro’s representation that Choicelinx was an innovative product unavailable from other sources. It was Hill’s understanding that D’Alessandro had engaged in substantive conversations with other companies

to make that determination. He did not ask D'Alessandro to provide any supporting documentation.

Although the State had not previously dealt with Choicelinx, Hill did not request any background or financial information about Choicelinx, information that he has required in some instances in the past. Hill was familiar with Choicelinx's CEO, Donna Lenki, from previous dealings with her, both as a representative of a health insurance company and as member of several commissions during the Shaheen administration. Hill was also familiar with Henchey, having served with Henchey on the negotiating team for the collective bargaining agreement.

At some point, D'Alessandro obtained a copy of a boilerplate contract from Choicelinx. On May 8, 2003, he sent a draft contract to then-Deputy Attorney General Steve Judge with a cover letter requesting review within 7-10 days. The contract was assigned to Assistant Attorney General Suzan Lehmann. After reviewing the draft, Lehmann determined that the contract was deficient in numerous respects; most significantly, that it did not contain the standard provisions that protect the State's interests, nor did it detail the technical terms of the agreement between Choicelinx and the State. She called D'Alessandro on May 13, 2003. During that conversation, Lehmann asked if there had been an RFP. D'Alessandro indicated that Choicelinx and two other companies had been contacted and that it was going to be a sole source contract, meaning no other companies would be asked to submit a proposal or bid on the service.

Lehmann did not question D'Alessandro's decision to pursue a sole source contract. Unless required by statute to follow an RFP or competitive bidding process, an agency has the authority to decide how it will procure a contract. An agency can seek advice regarding its legal obligations but typically, at the point a contract is submitted to the Attorney General's Office for review, the agency has completed the procurement process and the contract is essentially finalized. Such was the case with the Choicelinx contract. There had been no request for legal advice. The Division of Personnel is not subject to such statutory competitive bidding requirements, nor would the nature of the contract give rise to such requirements. Accordingly, there was no statutory prohibition against the process the Division followed.

Lehmann worked closely with Senior Assistant Attorney General Michael Brown and Attorney Sheila Evans, the attorney for Choicelinx, to make the necessary revisions to the contract. D'Alessandro referred Lehmann to Pepin for any information about the specific terms of the agreement between Choicelinx and the State. Before making contact with Pepin, Lehmann conferred with other attorneys in the AG's Office to clarify whether the attorney/client privilege, which would apply to conversations she might have with agency personnel regarding the Choicelinx contract, would also extend to conversations she might have with Pepin, an unpaid volunteer. It was determined that because Pepin was working for D'Alessandro on the Choicelinx matter on behalf of the Division of Personnel, the privilege would apply. Thereafter, Lehmann communicated directly with Pepin on numerous occasions.

On or about June 17, 2003, D'Alessandro asked Lehmann for guidance in drafting the cover letter that must accompany every contract submitted to the Governor and Council for approval. Lehmann provided a template and suggested that D'Alessandro insert the necessary

specifics, including a paragraph explaining why the contract was being awarded on a sole source basis.

Lehmann's suggestion regarding the inclusion of an explanation for the sole source contract was consistent with an April 29, 1999, memorandum issued by former Attorney General Philip McLaughlin and Commissioner Hill. In that memo, agency heads were advised that the Governor and Council had taken the position that sole source contracts were to be avoided, even if legally permissible, unless there was no other feasible option available. When seeking approval of a sole source contract, agencies were instructed to identify the contract as such and provide an explanation of the rationale for determining that a sole source contract was unavoidable and the process that led to that conclusion. It is not known whether D'Alessandro had knowledge of the memorandum.

D'Alessandro subsequently forwarded to Lehmann a copy of the completed draft. She does not recall whether she reviewed it.

On June 18, 2003, D'Alessandro presented Hill with a draft cover letter for Hill's signature, to accompany the Choicelinx contract when it was presented to the Governor and Council. The contract was presented to the Governor and Council on June 25th and was approved.

In November, in response to questioning by NH Public Radio reporter Josh Rogers, Hill questioned D'Alessandro about his contacts with the companies identified in the June 18 cover letter. According to Hill, D'Alessandro assured him that the contacts had been made. Hill requested supporting documentation, which D'Alessandro said he would have to get from Pepin. Wendall Packard, Press Secretary for Governor Benson, also spoke to D'Alessandro concerning the issue. D'Alessandro told Packard that Pepin had done the research and that while some of the companies may have been contacted in person, contact with others consisted only of a review of their respective websites. Packard subsequently called Pepin and asked which companies she called and when. She stated that she spoke to a person by the name of Karen at SHP, and a person by the name of Matt at Lumenos. She said that she did not tell either of them she was calling for the State of New Hampshire and would only have done so after determining that the company had the capability to provide the necessary services. Pepin also stated that the reference in the June 18th letter to "Black Mountain Black" was incorrect and should have read "Black River." She thought she might have left a message with that company. At the time of their respective interviews with the investigative team, neither Hill nor Packard had received any documentation from Pepin or D'Alessandro concerning those contacts.

Investigator Vandal attempted to contact each of the companies identified in the June 18th letter. He spoke to Brian Walker of Covantage who, after checking with his sales directors, reported that there was no record of any inquiry regarding their ability to service an account involving tens of thousands of people. Vandal spoke to Ann Van Bronkhorst of Lumenos, who told him that the sales personnel had no record of any contact with a person by the name of Linda Pepin or anyone inquiring on behalf of the State of New Hampshire. Vandal contacted SHPS, Inc. by telephone and e-mail, but did not receive any response. He was unable to locate a company by the name of Black River or Black Mountain Black.

Subsequently, Attorney Volinsky provided the investigators copies of printouts from a website, BenefitNews.com, which contain articles on SHPS, Covantage, Lumenos, and Black Mountain View. The printouts were dated between May 15 and June 18, 2003, at least some of which were obtained well after the kickoff meeting with Choicelinx, Anthem, and Delta Dental representatives took place. Attorney Volinsky indicated that the printouts reflected the extent of Pepin's research into those companies. As reflected by the dates on the printouts, the research was conducted after the contract with Choicelinx had been submitted to the Attorney General's Office for review.

According to the Choicelinx contract, Choicelinx is to provide to the State the following computer software components:

- Enrollment Manager: Provides a complete web-based enrollment management solution with real-time eligibility rules validation;
- Plan Selector: Integrates existing plan designs/options using a web-based platform;
- Configurator: Allows for the introduction of a variety of consumer driven product models, e.g. computer based benefit and/or medical management options;
- Transformation Engine: Manages data exchange with vendor systems;
- Benefits Inquiry: Employee level on-line tool for self-service benefit and policy inquiries.

Choicelinx is required to provide a call-center and other support services necessary for 24/7 access by state employees.

Investigator Vandal conducted a non-exhaustive internet search for companies that provide comparable services. That search revealed that similar enrollment, benefits inquiry, plan selection and transformation services may be available through a number of companies, including PeopleSoft Enterprise; ADP; Employease; Lumenos, Inc.; and Definity Health. However, none of the websites described the configuration of benefits as an available service. According to Lencki and Henchey, there is no other company that offers a service comparable to the Choicelinx benefits configurator. Molan reports having looked at a couple of other products that were similar to Choicelinx, but felt that they were not as heavily weighted towards educating the consumer – an aspect of the Choicelinx product he saw as highly beneficial.

Legal Analysis and Conclusions:

The circumstances surrounding the award of the Choicelinx contract raised three main questions:

- (1) Whether the awarding of a sole source contract violated any statutory requirements;
- (2) Whether the representations contained in the last paragraph of the June 18 cover letter gave rise to any criminal violations;
- (3) Whether the decision to forgo a competitive bidding process was tainted by improper influence on the part of Pepin and/or D'Alessandro.

With respect to the first question, there was no legal prohibition against the awarding of a sole source contract to Choicelinx. The competitive bidding requirement set forth in RSA 21-

I:11 applies to the purchase of all “materials, equipment, supplies, and services.” The term “services” is defined as:

services provided for general agency use including, but not restricted to, the following: credit card agreements, elevator maintenance, hazardous waste testing and removal, janitorial services, laboratory services, rubbish removal, security services, snow removal, soil testing, transportation, office machine maintenance, vehicle repair, vehicle rental and leasing, and warehousing. ‘Services’ shall not mean services provided solely to one agency.

RSA 21-I:11, I(f).

The Office of the Attorney General has taken the position that the competitive bidding requirement set forth in RSA 21-I:11 does not apply to the purchase of services under the Choicelinx contract. Services purchased under this contract are not services within the meaning of RSA 21-I:11, I(f), in that they are not services provided for general agency use.

With respect to the second issue, the evidence relating to the circumstances surrounding the submission of the June 18th cover letter to Governor and Council would not support a criminal charge against Hill, D’Alessandro, or Pepin. The only potentially relevant criminal statute is RSA 641:3, II, Unsworn Falsification, which provides in relevant part that a person is guilty of a misdemeanor if:

With a purpose to deceive a public servant in the performance of his official function, he:

- (a) Makes any written statement which he does not believe to be true; or
- (b) Knowingly creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading.

The relevant paragraph in the June 18 cover letter reads as follows:

the State requested information from vendors (SHP in KY, Black Mountain Black in NY, Definity Health in MN, Covantage in TX, Lumenos in VA) with similar capabilities. Choicelinx was the only company to respond that had the hardware, software, personnel and experience to fulfill the State’s requirements of a web-based benefits administration management system accessible by users on or before September 1, 2003.

The most reasonable interpretation of that language is that a specific request was made to each of the listed companies for information about its hardware, software, personnel, and experience; that at least one company other than Choicelinx responded; and that Choicelinx was the sole responding vendor able to meet the State’s needs. That is inaccurate.

Even so, there is insufficient evidence to establish a criminal violation. With respect to Commissioner Hill, there is no evidence that he signed the letter knowing that it contained false

information, or that he submitted the letter to the Governor and Council with a purpose to deceive one or more of them. Although, in hindsight, it is clear that Hill should have exercised more oversight with respect to the Choicelinx contract and Pepin's activities in general, there is no evidence that he engaged in any criminal or unethical conduct. Hill fully cooperated in the investigation and readily admitted to the investigators that he should have been more diligent in his oversight.

With respect to D'Alessandro, there is similarly no evidence that when he drafted the June 18th letter for Hill's signature, he did so with a purpose to deceive Hill or, ultimately, to deceive the Governor and Council. By all accounts, no one ever questioned D'Alessandro about the propriety of a sole source contract. Thus, logically he would have no reason to attempt to deceive Hill or the Governor and Council as to the basis for such a contract. The evidence is less clear as to whether he knew that the above-quoted paragraph was inaccurate. Although neither D'Alessandro nor Pepin talked to the investigators, the evidence strongly suggests that D'Alessandro relied heavily on Pepin for information regarding Choicelinx, including the information included in the draft letter. It is unclear to what extent, if any, D'Alessandro sought supporting documentation for that information. In addition, according to Lehmann, D'Alessandro told her that two, as opposed to five, potential alternative vendors had been contacted. Finally, with respect to Pepin, the evidence strongly suggests that she provided the information reflected in the June 18th letter. However, there is no evidence that she was involved in the actual drafting of the letter. Accordingly, she could not be charged with either making a written statement or creating a false impression in writing. Her only potential liability under RSA 641:3, II is as an accomplice or co-conspirator. However, either charge would require proof of intent to deceive a public official in the performance of his/her official duties. Given the lack of any official objection to the contract with Choicelinx, and the absence of any evidence that Pepin would derive some benefit from the awarding of the contract, the evidence of such intent is lacking.

As to the third question - whether the contracting process was tainted by Pepin and D'Alessandro - the evidence establishes that neither D'Alessandro nor Pepin had a prior working relationship with Choicelinx Company or its founders, or that they received any pecuniary benefit from advocating for Choicelinx. Representatives of Choicelinx had developed contacts with the State before either Pepin or D'Alessandro were involved. The evidence suggests that once Pepin and D'Alessandro became aware of the company's capabilities, they narrowed their focus to Choicelinx and did little, if anything, to investigate whether there were other vendors who could provide a similar service.

Several of those interviewed during the investigation expressed the opinion that Choicelinx was a good product and was a logical choice. For example, Commissioner Hill noted that because Choicelinx is a local company, it is readily available to resolve problems and travel costs are minimized. In addition, because of Lencki and Henchey's prior experience working with local insurance companies and with the State, they were familiar with the particular idiosyncracies of dealing with the State. Finally, Choicelinx was able to work within a very tight timeframe, which was critical to the State's move to self-funding. At least one of the SEA representatives stated that there were already observable benefits to the Choicelinx program, in

that for the first time, they were able to get accurate figures on who was being insured and to eliminate redundancies in coverage of specific individuals.

Insurance Contract Negotiations and Broker Commission Fees

As a result of the media reports concerning the awarding of the Choicelinx contract, and the resulting public discussion, it was revealed that Pepin had been an active participant in the negotiations for the renewal of the health insurance contract for State employees, and had received payments for her efforts from Dennis French, an acquaintance of Pepin's and the newly appointed insurance broker for the State. The information raised questions concerning the propriety of French's appointment, Pepin's role in the negotiations and the legality thereof, and the legality of the payments to her. The investigation revealed the following information regarding those issues:

For years, the State has been using insurance brokers to assist in procuring health and dental insurance coverage for its employees and retirees. Although the use of brokers is not statutorily required, their services have been viewed in the past as a means of obtaining the lowest possible insurance premiums for the State. The broker serves several functions, including negotiating with insurance carriers on behalf of the State, reviewing insurance plan designs and recommending cost-effective alterations, and monitoring insurance utilization rates over the life of the contract. For those services, the broker is paid a monthly commission fee by the insurance carrier, which is negotiated as part of the insurance contract. The fee is typically a fixed percentage of the total premiums, and is included as an administrative cost in the contract. Although paid by the carrier, the cost is ultimately borne by the State as part of the premiums. In order to receive broker commission fees under the State contract, an individual must be licensed by the NH Insurance Department as an "insurance producer," and be appointed as the official broker of record for the State. Donald Piatt and Peter Lunsford of Kenmore Associates, and Frank Marcellino were the brokers of record for the state dental insurance contract for over ten years. In 1997, Kenmore Associates was also appointed as broker of record for the state health insurance contract.

D'Alessandro became aware of the State's use of brokers while serving on the transition team. According to his attorney, D'Alessandro attempted to work through the brokers to obtain needed information from the insurance carriers but was dissatisfied with their response time and the content of their response, so he and/or Linda Pepin began communicating directly with the insurance carriers. That experience led him to question whether the State was obtaining sufficient value for the broker commission fees that were built into the contracts. In late February, he and Pepin met with representatives of Delta Dental, during which commission fees were discussed. They were informed that the contracted rate for commission fees was one percent of the premiums paid. On or about March 6, 2003, in response to a request from D'Alessandro, Delta Dental informed him that the premiums paid to date were \$5,654,685.02 and that one percent of that figure was paid to the brokers in the form of commission fees. At around the same time period, D'Alessandro also had a discussion with representatives of Anthem concerning the level of commission being paid under the contract, although the timing of that discussion is unclear.

After assuming office as Director of Personnel, D'Alessandro expressed his concern to Commissioner Don Hill that the brokers were making an excessive amount of money for what he claimed was very little work. Hill advised that D'Alessandro had the authority to terminate the brokers' appointments.

At that time, D'Alessandro and Pepin were actively involved in negotiations with Anthem and Cigna for the state insurance health contract. Although Kenmore Associates was still the broker of record for that contract, D'Alessandro and Pepin essentially bypassed them and dealt directly with the insurance carriers.

On March 24, 2003, D'Alessandro sent a letter to both Delta Dental and Anthem announcing that Kenmore Associates was no longer the official broker for the State and that Dennis French of NIBRI was appointed in its stead. He later clarified with Delta Dental that Frank Marcellino had also been removed as a broker of record. To that point, D'Alessandro had not expressed to either Marcellino or Kenmore Associates that he was dissatisfied with their services.

Prior to French's appointment, D'Alessandro discussed with Dennis Cahill of Anthem the possibility of Pepin being appointed as broker of record, so that she could receive fees under the contract. Cahill informed him that Anthem would require written notice of the appointment and also stated that Pepin would have to be licensed.

On March 20, 2003, D'Alessandro had a similar conversation with Erika Flewelling at Delta Dental. He explained that he would be terminating the brokerage arrangement with Kenmore Associates and asked how the commission fee could be transferred to Pepin, who was working as a volunteer consultant. Flewelling informed him that the State could pay her as a consultant with its own funds but Delta Dental could only pay commission fees to Pepin if she was licensed as a producer by the NH Department of Insurance. Subsequently, on March 24th, Pepin informed Flewelling that Dennis French would be appointed as the broker of record, and that he would remain in that capacity until Pepin obtained her license. (According to the NH Department of Insurance, Pepin has never applied for a producer's license.) On the same date, D'Alessandro sent out a formal letter to Delta Dental and Anthem, informing them of French's appointment as the broker of record.

Flewelling, Cahill, and O'Leary all told the investigators that they were somewhat surprised at French's appointment. French had other broker accounts with both companies, but none of the magnitude of the State contract, which covers approximately 12,000 employees and 40,000 insureds. According to Delta Dental, French had one account involving in excess of 250 employees, but the majority of his accounts were for companies of ten employees or less. Similarly, French's accounts with Anthem were typically small to medium sized ones of 20 – 500 employees.

Following his appointment as broker, French began receiving commission fees under dental and health insurance contracts. With the exception of the final commission payment he received from Delta Dental in December 2003, French paid the entire amount of those commission fees to Pepin through her company, Alpha Directions. He received fees under the

health insurance contract with Anthem from mid-March through September, 2003, totaling approximately \$131,539.00. (The Anthem contract, which was to expire on June 30, 2003, was extended an additional three months.) He received approximately \$63,194.00 in commission fees under the dental contract with Delta Dental from mid-March through November, 2003, all but \$7,724.00 of which was turned over to Pepin. French did not make any payments to anyone else. (Commissioner Hill withdrew French's appointment as broker for dental insurance, effective December 1, 2003.) Pepin received a total of approximately \$187,010.00 over the course of eight months.

French estimated that he put in approximately six hours of consulting work on the state contracts during the entire period that he was the broker of record. Pepin was expected to do the vast majority of the work required of the broker, which French described as monitoring the claims runs, "number crunching," and exploring the cost implications of various plan designs. French was available to consult as needed, as was his business partner, Robert Bergan, a licensed broker.

Account executives from both Cigna and Anthem report that, despite French's position as broker of record, they had no contact with him during the contract negotiations. According to Delacey from Cigna, Pepin served that role. She was actively involved in negotiating the terms of the contract, including doing such things as advocating for a reduction in the proposed administrative costs and inquiring about options such as changes in the co-payment requirements for various benefits. Likewise, O'Leary from Anthem reported that Pepin was the main contact person for the State. He estimated that at some points when the negotiations were most intense, he was in contact with Pepin 2-3 times per week. When it became clear that a new contract would not be in place for the July 1 renewal date, Pepin contacted him and requested that Anthem extend its contract for one month at the same premium rates.

Robert Bergan reports that he served as an advisor to Pepin during the negotiations, particularly on issues relating to the transition from a fully funded program to self-funding. At the time, the State was exploring the potential cost savings for unbundling the various components of the health insurance plan, and bidding each component separately. He drafted the Requests for Proposals for Medical Reinsurance, Pharmacy Benefit Management, and Dental Insurance for Retirees, under Pepin's direction and approval, responded to any questions about the RFP's, analyzed the proposals that were submitted, and advised Pepin as to areas in the proposals in which there was room for further negotiation. He had no involvement or input on the largest component of the insurance contract, the medical health plan, for which no RFP was issued. When Pepin asked Bergan questions about that aspect of the contract, Bergan offered to talk directly to Anthem and Cigna, but Pepin declined that offer. For his efforts, which spanned an approximate three-month period, Pepin paid Bergan \$2500.00.

The accounts of how French was chosen to serve as the State's insurance broker and how his business relationship with Pepin developed varied significantly. Those accounts are summarized below:

Dennis French's account: French met Pepin in November 2002, through Greta Cocco, a well-established insurance broker in NH. French, Cocco, and a third insurance broker, Robert

Bergan, had decided to join forces under the name of Orion, Inc., in order to obtain larger brokerage accounts than any of them were able to handle on an individual basis. Cocco had had business contacts with Pepin and thought that Pepin's expertise in the area of human resources could be a valuable asset in serving certain accounts.

Cocco and French met with Pepin on a couple of occasions to talk generally about their business capabilities, business philosophies, and interests. During those initial meetings, French had no knowledge of Pepin's involvement with the State. At some point in early March, either Pepin or Cocco asked French if he would be interested in speaking with D'Alessandro about health insurance benefits and self-funding issues. French stated that he had no personal knowledge of how that call came about, but suspects that Pepin had been talking to Cocco about the problems she and D'Alessandro were encountering in dealing with those issues and Cocco recommended that they speak with French.

Pepin, French, and D'Alessandro met and had a general discussion about such things as the design of the State's health insurance benefit plan, their perception that the then-current design encouraged high rates of utilization, possible avenues of re-design, D'Alessandro's claimed difficulty obtaining concise figures and information from the current brokers, and Anthem's proposed renewal rates. There was a subsequent meeting in mid-March, during which D'Alessandro asked if French was interested in becoming the broker of record for the State. D'Alessandro explained that it would only be a temporary appointment, through the term of the then-current contract that was due to expire in June 2003. D'Alessandro indicated that the State would no longer be using brokers after that date and would likely only need an insurance consultant.

Because of other personal obligations, French was not sure he wanted to assume the responsibility as broker and said that he would have to think about it. The same day, he spoke to Cocco about the offer and his reluctance to accept. They discussed whether Pepin might be able to assist him, reasoning that she was already doing the work that was required. (Although Pepin was not a licensed broker, it was their understanding that French could pay her for providing a "value added service" under RSA 402:41). Thereafter, French called D'Alessandro and accepted the appointment as broker.

French had not spoken to Pepin about working with him, but believed that Cocco had done so. Although no formal agreement was made, it was his understanding that Cocco had arranged that Pepin would perform most of the work under the broker appointment and French and Robert Bergan, the third partner in Orion, would consult as necessary. French had no discussions with Bergan about this arrangement, but believes Cocco did.

French estimates that he performed a total of approximately six hours of work during the time period that he was broker of record. Prior to receiving the first commission checks from the carriers, he had no knowledge as to the amount of the fees he would be receiving. There was no discussion or understanding that D'Alessandro would reap any benefit, whether financially or otherwise, from French's appointment.

Greta Cocco's account: Cocco was instrumental in arranging the working relationship between Pepin, French, and Bergan. During the early months of 2003, she, French, and Bergan were involved in forming their own company, Orion. When Pepin started assisting D'Alessandro in reviewing the renewal proposals for the state health insurance contract, she consulted with Cocco about various aspects of that process. At some point, it became apparent to Cocco that, given the compressed time frame within which Pepin was working to formalize the new state health insurance contract, Pepin needed additional assistance. She made an informal offer of her services to Pepin, as well as those of French and Bergan.

Around the same time, Pepin asked Cocco if she would be interested in becoming the broker of record for the State. Cocco declined and recommended French, whom she viewed as an expert in self-funding issues. She understood that Pepin contacted French, who later met with D'Alessandro, after which French was appointed as broker. At one point, French and Cocco discussed whether French could pay Pepin as a consultant under the newly enacted provision of RSA 402:41, and decided it was permissible. Cocco had no involvement in the discussions about how much French would pay Pepin.

Cocco subsequently learned that Bergan was providing services to Pepin related to the State contract. Around the same time, she, French, and Bergan had discussions about the faltering financial condition of Pepin's company, AlphaDirections, and the future business opportunities that might develop between Orion and AlphaDirections as a result of their providing professional assistance to Pepin on her immediate, short-term project, particularly if that assistance was given at minimal or no cost to Pepin. Cocco did not specifically encourage French or Bergan to work for free, but understood that they would essentially be working for nothing. She also understood that it would be a short-term project, as the contracts under which French was to be paid would be expiring.

Robert Bergan's account: Cocco introduced Bergan to Pepin in early 2003, identifying Bergan to Pepin as a valuable resource on employee benefit issues. In April 2003, Pepin met with Bergan and explained that she was assisting D'Alessandro in the renewal of the state health insurance contract and the transition to self-funded insurance. They agreed that Bergan would serve as an advisor to Pepin. Around the same time, Cocco spoke to Bergan about helping Pepin out, and encouraged him to do so for free, with the understanding that it could help Orion's business in the long run. Pepin insisted on paying Bergan, however, and ultimately paid him \$2500. Although Bergan knew that French had been appointed as broker of record, he had no discussion with Pepin about French's role in the process. Bergan took his direction from Pepin.

Attorney Lenehan's proffer as to what D'Alessandro's account would be: At some point prior to French's appointment, Hill asked D'Alessandro how Pepin was getting paid for all the work she was doing and whether D'Alessandro was paying her. When D'Alessandro indicated that she was not getting paid, Hill queried whether Pepin could get paid the broker's fees and suggested that D'Alessandro check with the insurance carriers. D'Alessandro inquired of both Delta Dental and Anthem, and learned that Pepin could not be paid commission fees unless she was a licensed producer and was made the broker of record for the State. D'Alessandro passed that information back to Hill, who asked if he knew any brokers. D'Alessandro indicated that he did – he was, at that point, thinking of Cocco and French, the latter of whom he knew only by

reputation. He subsequently asked Pepin to call Cocco, who recommended Dennis French. D'Alessandro conveyed that to Hill, who told him to "go ahead and set it up." D'Alessandro spoke to French and asked if he was interested in becoming the broker of record. He explained that it would be a temporary appointment that would end as of June 30, 2003. They had some discussion about Pepin getting paid, but D'Allesdandro could not recall the details. D'Alessandro did not know how much Pepin ultimately received from French; he did not receive any money, nor was French's appointment tied to any promises regarding future business opportunities for D'Alessandro.

Mary Ann Steele's account: Steele was present during a conversation between D'Alessandro and Hill about Pepin receiving some payment for her work. She believes that the conversation took place in early April, after French had been appointed as broker, because she recalls Hill and D'Alessandro were scheduled to meet later in the week with the former brokers, who were protesting their removal. Steele recalls that Hill asked D'Alessandro how Pepin was getting paid for all the work that she had been doing and expressed concern upon learning that she was not receiving any pay. In response, D'Alessandro suggested that she could get paid under French's contract. Hill asked if Pepin was a broker, to which D'Alessandro replied that she was not, but that French was and she would be able to work under his license. The conversation moved on to other topics at that point. Steele had no additional information on this issue.

Commission Don Hill's account: Hill does not have specific recollection of any conversation with D'Alessandro concerning payment for Pepin's work. He did not deny that he might have asked how she was getting paid, although he did not recall doing so. It was his recollection that D'Alessandro spoke to him about French and indicated that because French ran a one-person operation, D'Alessandro thought that he might be able to negotiate a lesser commission fee.

The events surrounding French's appointment and his funneling of commission fees to Pepin raised investigative concerns about whether D'Alessandro had received any payment from either French or Pepin for his role in orchestrating the appointment. The commission payment records provided by Delta Dental and Anthem, and canceled checks provided by French establish that, with the exception of the final payment from Delta Dental, French passed on the entire amount of his commission fees to Pepin.

Records obtained from D'Alessandro, Pepin, and AlphaDirections, Inc. ("ADI"), in the form of canceled checks, computerized business ledgers, and receipts, revealed that during the period of July 2002 and December 2003, there had been an exchange of a significant amount of money between D'Alessandro on the one hand, and Pepin or ADI on the other. Specifically, canceled checks established that during that time period D'Alessandro made the following payments totaling \$6500.00:

- July 20, 2002 – check issued to ADI in the amount of \$1500.00
- March 22, 2003 – check issued to Linda Pepin in the amount of \$3500.00
- April 9, 2003 – check issued to Linda Pepin in the amount of \$1500.00

The general ledger for ADI also indicates that ADI received a payment from D'Alessandro on November 21, 2003, in the amount of \$1780.00. Attorney Lenehan stated that D'Alessandro

would acknowledge that payment was made, although at the time of the interview the check had not yet cleared the bank.

During the same time period, Pepin made the following payments to D'Alessandro totaling \$10,450.00:

- May 12, 2003 – personal check issued in the amount of \$2500.00
- May 24, 2003 – personal check issued in the amount of \$2500.00
- May 28, 2003 – personal check issued in the amount of \$1000.00
- May 28, 2003 – ADI-issued check in the amount of \$1500.00 (with notation of “Loan Repayment”)
- June 12, 2003 – ADI-issued check in the amount of \$950.00 (with notation of “Expense Reimbursement”)
- July 12, 2003 – ADI-issued check in the amount of \$2000.00 (with notation of “~~Loan Repayment~~ Expense Reimbursement”)

The financials records from AlphaDirections reveal that prior to the onset of payments from French, the company had virtually no stream of income.

Attorney Lenehan proffered the following information about the payments made between D'Alessandro and Pepin: After D'Alessandro left Cabletron, he worked for a short period of time at Enterasys, after which he took on some private consulting work. He also began working for AlphaDirections, to assist Pepin in developing the business. Although there was no formal agreement, Pepin agreed to reimburse him for mileage at a rate of \$100.00 per month, and for any other costs he incurred on behalf of the company. The three checks he issued to Pepin and or AlphaDirections were loans. The six checks he received from Pepin and/or AlphaDirections reflected a combination of loan repayments and reimbursement for \$5,890 in expenses he incurred on behalf of AlphaDirections. The expenses were broken down as follows:

- \$2500 for the purchase of computer hardware and software
- \$370.00 for the purchase of ADI business cards
- \$380.00 in membership dues for two human resource associations
- \$1200 for mileage, at a rate of \$100/month

Attorney Lenehan provided the following documents in support of those expenses:

- a receipt for the purchase of computer hardware and software from Best Buy in October 2001, and a correlating credit card statement for D'Alessandro reflecting that purchase
- copies of receipts for membership dues from WorldatWork and Society for Human Resource Management, dated November 2, 2001, and January 31, 2002, respectively
- a copy of a bank statement reflecting a \$310.00 purchase from N.E. Printing Company in Portsmouth

With respect to the approximate \$1800 payment to Pepin in November 2003, Attorney Lenehan stated that it constituted reimbursement for a plane ticket to Wales and car rental, which Pepin paid for as part of her arranging a joint trip to the United Kingdom. Lenehan provided

copies of a credit card statement for D'Alessandro, which includes purchases made in London and Wales during early November 2003.

Attorney Volinsky provided similar information regarding the money his client had received from, and paid to, D'Alessandro. He stated that the payments from Pepin/ADI were both loan payments and expense reimbursements, and that the November payment from D'Alessandro was reimbursement for his airfare and car rental, stemming from an overseas trip that he took with Pepin.

Legal Analysis: There are four significant legal issues that arise from these facts:

1. whether, in engaging in negotiations with Anthem and Cigna and accepting payments therefor, Pepin was acting as an unlicensed insurance producer, in violation of RSA 402-J:3, RSA 402-J:13, II, and/or RSA 405:44-a;
2. whether by paying Pepin to engage in those activities, French was in violation of RSA 402-J:13, I, which prohibits a broker from paying a fee or other valuable consideration to a person for negotiating insurance if that person is unlicensed as a producer;
3. whether the business arrangement between French and Pepin violated any criminal laws; and
4. whether D'Alessandro and/or Pepin violated the Code of Ethics.

With respect to the first issue, there is ample evidence to support a finding of a violation of RSA 402-J:3 and RSA 405:44-a. RSA 402-J:3 provides that no person shall "sell, solicit or negotiate insurance" unless licensed in accordance with RSA chapter 402. The term "negotiate" means "the act of conferring directly with or offering advice to a purchaser or prospective purchaser of a particular contract of insurance concerning any of the substantive benefits, terms, or conditions of such contract, provided" RSA 402-J:2, XI. RSA 405:44-a provides that no person shall, for a fee, give any advice, recommendations or information as to the terms, conditions, benefits, coverage or premiums of an insurance policy or contract, or as to the advisability of altering, changing, renewing such a contract, unless licensed in accordance with RSA chapter 402-J. The information provided by Delacey, O'Leary, Cahill, and Higgins, as well as the proffers from D'Alessandro's and Pepin's attorneys, all indicate that Pepin was advising the State, through D'Alessandro, regarding benefits, terms, and conditions of a contract. The Department of Insurance has no record of Pepin being licensed as an insurance broker. Because the Department of Insurance is responsible for regulating insurance producers and enforcing the laws relating thereto, the matter was referred to the Department for further review.

There is similar evidentiary support for a finding that French, a licensed producer under RSA chapter 402-J, violated RSA 402-J:13, I, by paying Pepin to serve in his stead and negotiate the terms of the state health insurance contract. French has stated that he was paying Pepin for providing a "value added service" under RSA 402:41. As these are also issues that fall within the authority of the Department of Insurance, they were referred to the Department for further review.

The Department of Insurance has completed an independent investigation and concluded that there is sufficient evidence to charge both French and Pepin with licensing violations, a

conclusion that is fully supported by the evidence obtained through the investigation conducted by the Attorney General's Office. The Department has issued an order to show cause and notice of hearing to both Pepin and French for licensing violations. An adjudicatory hearing will follow. The action being taken by the Department is appropriate and in accordance with its regulatory authority. The penalty for any violation of the licensing laws is a fine of up to \$2500.00 per violation. RSA 400-A:15. In addition, the Department may "place on probation, suspend, revoke, or refuse to issue or renew an insurance producer's license" for a violation of the licensing laws. RSA 402-J:12, I(b).

With respect to the third issue, despite denials to the contrary, the facts, as described above, create a reasonable inference that D'Alessandro, Pepin, and French, among others conspired to circumvent the law prohibiting the payment of broker's fees to an unlicensed individual. Specifically, the facts suggest that D'Alessandro investigated the possibility of having the commission fees paid to Pepin and when told that would not be possible, he and Pepin explored, as an alternative, having the commission fees funneled through a licensed broker to Pepin. Pepin recommended French, who agreed or acquiesced to paying Pepin a portion of the commission fees if he were appointed broker. Before D'Alessandro actually appointed French, he and French had some discussion about Pepin receiving some portion of the broker's fees.

Even assuming that the State could prove those facts, however, it would not constitute the criminal offense of conspiracy. One of the elements of a conspiracy is that the actor agrees that a "crime defined by statute be committed." RSA 629:3, I. Receipt of commission fees as an unlicensed broker is a violation level offense, punishable by a fine of up to \$2500.00. A violation is not a crime, RSA 625:9, II(b), and thus would not satisfy that key element.

The other possible criminal code violation suggested by these facts is a violation of RSA chapter 640, Corrupt Practices. That chapter sets out a variety of offenses prohibiting any individual from engaging in conduct that would improperly influence a public servant, to include offering or promising a pecuniary benefit to the public servant in exchange for some past or future action by that public servant. With the exception Bribery, RSA 640:2, and Improper Influence, RSA 640:3, neither of which is relevant to this situation, each of the offenses defined in that chapter requires, as an element of the offense, proof that the public official either "solicits, accepts or agrees to accept" a pecuniary benefit from someone, or that a person "promises, offers, or gives" a pecuniary benefit to a public servant. Further, there must be some nexus between the pecuniary benefit and past or possible future action on the part of the public servant; in other words, there must be evidence of a "quid pro quo." For example, RSA 640:4 makes it a crime for a public servant to solicit any pecuniary benefit in return for "having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty." Similarly, RSA 640:5 prohibits a public servant from soliciting any pecuniary benefit from a person "who is likely to become subject to or interested in any matter or action pending before the public servant." Each of these statutes is designed to prevent the improper influence of a public servant's official actions by the promise of direct or indirect economic advantage.

For purposes of the Corrupt Practices Chapter, the term "public servant" is defined, in relevant part, as "any officer or other employee of the state or any political subdivision thereof,

including judges, legislators, consultants, jurors, and person otherwise performing a governmental function.” The term “pecuniary benefit” is defined as “any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally.”

Looking first at D’Alessandro, there can be little dispute that he is a public servant for purposes of the Corrupt Practices statute. Given the differing and somewhat questionable explanations of how French’s appointment and his business relationship with Pepin evolved, one could theorize that D’Alessandro agreed to appoint French in exchange for a promise of future business opportunities through, or financial payment from, NIBRI or Orion (the two businesses in which French was involved), or Linda Pepin. However, there is little to no evidentiary support for such a theory. The investigation did not reveal any evidence of such a promise or monetary payment. French expressly denied any such understanding. While neither Pepin nor D’Alessandro spoke to the investigators, their respective attorneys represented that there was no such agreement. The financial records obtained from NIBRI and AlphaDirections establish that all of the commission fees paid to French, totaling approximately \$187,000.00 were funneled to Pepin, with the exception of the final \$7700 payment from Delta Dental. The financial records and other documents obtained from AlphaDirections, Pepin, and D’Alessandro reveal an exchange of money during the period between July 2002 and November 2003. Other records provided by Pepin’s and D’Alessandro’s attorneys indicate that those transactions were for personal and business-related matters.

Given the evidence that AlphaDirections was generating little, if any, income prior to the influx of money from French, it would not be unreasonable to infer that D’Alessandro orchestrated French’s appointment and the funneling of commission fees to Pepin to ensure that he could recover the money he loaned Pepin and her company. However, such an inference would not be sufficient to negate, beyond a reasonable doubt, the countervailing non-criminal explanation that D’Alessandro was merely seeking a means to compensate her for the work that she was performing, an explanation that would also be reasonably supported by the evidence. In short, the investigation did not reveal sufficient evidence upon which to charge D’Alessandro with an offense under RSA chapter 640, and/or to prove such a charge beyond a reasonable doubt.

Turning to Pepin, her status as a public servant is only slightly less clear. Her appointment as a member of the State’s collective bargaining agreement negotiating team would qualify her as a public servant for that purpose. In addition, although not formally appointed or contracted to serve as a consultant to the State on health insurance issues, she was clearly acting in that capacity. She essentially served as D’Alessandro’s representative in the contract negotiations with Anthem and Cigna. Officials from both insurance companies viewed her as the point person for the State regarding contract renewal issues. From all perspectives, she was acting on behalf of the State and performing a governmental function, albeit without official sanction. One could make an argument that her role with respect to the health insurance contracts was essentially that of an independent broker, given that she was being paid as a consultant to a broker. However, the weight of the evidence is otherwise.

Even assuming that the State could prove beyond a reasonable doubt that Pepin was acting as a public servant, there is insufficient evidence to support a charge that she accepted, solicited, or agreed to accept the commission fees - a pecuniary benefit - in exchange for her allowing herself to be influenced in a matter or pending official decision. One could infer from information set forth above that Pepin agreed to recommend to D'Alessandro that French be appointed broker of record, in exchange for the promise that she would be paid some portion of the commission fees he would receive. However, the information could also support an inference that she recommended French for legitimate reasons – that he could provide needed expertise in the area of self-funded insurance programs.

Although the indirect receipt of commission fees from one of the two health insurance companies with whom Pepin was negotiating a possible future contract is very troubling, it does not rise to the level of a criminal offense. Anthem was contractually obligated to pay commission fees to the State's broker of record, at an established rate under the then-existing contracts. The fees could not change, regardless of which company Pepin ultimately recommended for the contract award, assuming she had the authority to make such a recommendation. Thus, the nexus between the payment or receipt of fees and a future award recommendation is absent.

While there does not appear to be a viable criminal charge, the evidence supports a finding that D'Alessandro violated the Code of Ethics implemented by executive order of Governor Shaheen. That code provides, in relevant part, that:

Public officials and public employees shall not use their positions with the government to secure privileges or advantages for themselves, which are not generally available to governmental employees, or to secure governmental privileges or advantages for others.

There is strong evidence that D'Alessandro used his position in an effort to secure a governmental advantage for Pepin. He explored with both Delta Dental and Anthem the possibility of having the commission fees paid directly to Pepin. After learning that the fees could only be paid to a licensed broker who was the State's broker-of-record, he exercised his authority to appoint French to that position, after discussing with French some payment to Pepin. Neither French nor Pepin would have been entitled to any portion of those fees, absent D'Alessandro's actions as a public official.

Pepin's conduct raises a significant conflict-of-interest issue as well. In her role as point person for the State in the insurance contract negotiations, she essentially dictated the design of the contract on which the insurance carriers were to bid. One of the terms of the contract was a broker commission fee – a fee that she would be in a position to receive.¹ There was, at a minimum, an appearance of a conflict of interest, in that her personal interests would be served by negotiating a high commission rate, whereas the interests of the State would be served by obtaining the lowest possible commission rate. Although privately employed insurance brokers are faced with a similar conflict, there is an inherent pressure in the competitive market to obtain

¹ Once the negotiation process was taken over by Hill and members of the AG's office, the insurance companies were instructed not to include commission fees as part of the administrative costs.

the most favorable terms for the client. Because of Pepin's unique position – a volunteer whose role involved making significant decisions about the public's finances – she was not subject to the pressures of the private market place, nor could she be held accountable in the same fashion as a public official. This lack of accountability, coupled with the potential for making a significant income from the public coffers created a situation ripe for abuse.

CONCLUSION

Based on the foregoing, it is evident that D'Alessandro and Pepin both engaged in troubling and unethical conduct in their respective roles as public servants. As discussed above, the evidence strongly supports a finding that D'Alessandro violated the Code of Ethics by orchestrating the funneling of insurance commission fees to Pepin through French. In light of that finding, the Attorney General has recommended to Governor Benson that he seek D'Alessandro's resignation as the Director of Personnel. In the event that recommendation is rejected, or the request for resignation is declined, the Attorney General will file a petition with the Governor and Executive Council under RSA 4:1, seeking D'Alessandro's removal on the basis of misfeasance.

While there is insufficient evidence to support a criminal charge against Pepin in connection with the commission fees, there is ample evidence to support a finding of unethical conduct. Pepin was indirectly receiving those fees at the same time that she was negotiating the terms of the health insurance contract, the terms of which included continuing commission fees. However, because the Code of Ethics contains no penalty provision and Pepin has resigned from the State, there is no available option for sanctioning such conduct. This does not alter the Attorney General's conclusion that her conduct was improper and unethical.

There is, however, ample evidence that Pepin engaged in multiple violations of the insurance licensing laws by providing insurance consulting services and accepting a fee for those services without the requisite license. The NH Department of Insurance is currently pursuing those charges against her. Pepin is facing a potential fine of \$2500.00 for each violation. The Attorney General views this action as appropriate under the Department's regulatory authority.

There is also significant support for a finding that Dennis French violated the insurance licensing laws by paying Pepin, an unlicensed insurance producer, for engaging in insurance negotiations. The NH Department of Insurance is currently pursuing that charge against him.